In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 941

CHARLES RIVIERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner and others were convicted of one count of conspiracy to violate 18 U.S.C. 1341, and 19 counts of mail fraud, in violation of 18 U.S.C. 371, 1341, 1342. Petitioner was given concurrent sentences of two years' imprisonment on all counts. The court of appeals affirmed (Pet. App. A1-A11).

As in the companion case of *Kellerman* v. *United States*, O.T., 1970, No. 736, certiorari denied, December 14, 1970,[1] we rely on the opinion of the court of appeals; we add only the following with respect to two of petitioner's contentions.

First, citing *Parr* v. *United States*, 363 U.S. 370, and *Kann* v. *United States*, 323 U.S. 88, petitioner argues that the scheme for the sale and distribution of counterfeit credit cards did not involve use of the mails within the meaning of 18 U.S.C. 1341. But the fraudulent use of a card over a period of several weeks without detection (Tr. 190-200) by co-defendant and co-conspirator Pucci depended for its success upon the time lag, necessarily caused by use of the mails, between the use of a credit card and the discovery that the use was fraudulent. Pucci thus caused use of the mails in connection with the fraud. *Adams* v. *United States*, 312 F. 2d 137 (C.A. 5); *United States* v. *Hendrickson*, 394 F. 2d 807 (C.A. 6), certiorari denied, 393 U.S. 1031.

Second, petitioner claims that Pucci's use of the credit card was an aberration, entirely outside the scope of the conspiracy. But hundreds of counterfeit cards were involved; Confessore, one of the co-conspirators, supplied embossed cards ready for immediate use; these were brought to another co-conspirator's residence, where Pucci took one; petitioner himself contemplated the use of these cards, as indicated by his statement that it did not matter whether Con-

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[1] A copy of our brief in opposition in that case is being supplied to petitioner's counsel.

[illegible] could be located because petitioner and his co-conspirators still had the embossed cards (Tr. 189, 265); and, finally, one of the co-conspirators, Travers, accompanied Pucci on several occasions when he used the card and once asked him to purchase airline tickets with it, which he did (Tr. 190-192, 195). The claim petitioner now raises—that the substantive offenses were part of a separate conspiracy in which he had no part—was squarely placed before the jury by the arguments of counsel for the defense and the government (e.g., Tr. 490-501, 514, 521-522, 530-532), and by the trial court's charge (Tr. 617). The court of appeals therefore properly relied on the jury's resolution of this factual issue (Pet. App. A8).

It is respectfully submitted that the petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.